DEC 19 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 640

JOHN M. TOMASIAN, *Petitioner*

v.

SARAH MANOUKIAN AND GLORIA TATIGIAN, Individually and as Executrices of the Estate of Kohar Tomasian, deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RUTHERFORD DAY,
International Building
Washington, D. C.

December 19, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	10

Appendix 1	1a
Appendix 2	10a

CITATIONS

CASES:

Browning v. *Browning*, 126 N.J. Eq. 55, 7 A.2d 816	8
Buckley v. *Gray*, 110 Cal. 339, 42 P. 900	8
Cathcart v. *Robinson*, 5 Peters 264	8
Chung Fook v. *White*, 264 U.S. 443	10
Crooks v. *Harrelson*, 282 U.S. 55	10
Elliott v. *Brent*, 17 D.C. (6 Mackey) 98	8
Fisher v. *Fisher*, 250 N.Y. 313, 165 N.E. 460	8
Holy Trinity Church v. *United States*, 143 U.S. 457	8
Hunter v. *Bryant*, 2 Wheaton 32	9
Keller v. *Potomac Electric Power Company*, 261 U.S. 428	7
Prentis v. *Atlantic Coast Line Company*, 211 U.S. 210	6
Throckmorton v. *Holt*, 180 U.S. 552	9
United States v. *Cadarr*, 197 U.S. 475	2
Wayman v. *Southard*, 10 Wheaton 1	6

CONSTITUTION:

Article I, Section 8, clause 17	6

Page

STATUTES:

United States Code:
28 U.S.C. 1254 (1) 2

Statutes at Large:

45 Stat. 1007 7
45 Stat. 1541 7
2 Stat. 103 8
31 Stat. 1189 8

D. C. Code (1951):

Section 19-104 ..... 3, 4
Section 19-105 ..... 3, 4
Section 49-301 3
Page 1535 6
Page 1536 7

D. C. Code (1929)

Section 1-1 7
Page v 7
Section 29-24 8
Section 29-25 8
Section 29-26 8

British Statutes:

25 George II (1752) Ch. 6, secs. 1 and 7..... 6, 8
6 Edward I (1278) Ch. 5, sec. 1 6
27 Elizabeth (1585) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

JOHN M. TOMASIAN, *Petitioner*

v.

SARAH MANOUKIAN AND GLORIA TATIGIAN, Individually and as Executrices of the Estate of Kohar Tomasian, deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John M. Tomasian prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the order and judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at

237 F. 2d 211. A copy of the opinion is set forth in Appendix 1 hereto. The judgment of that Court is copied and set forth in Appendix 2 hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals were both filed September 20, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and *United States* v. *Cadarr,* 197 U.S. 475.

QUESTIONS PRESENTED

(1) Whether British statutes, in effect as law before and since the Revolution, within the District of Columbia and reproduced in its Code have the flexible characteristic of adaptability and alterability, by judicial decree, for not only changed conditions but simply the peculiar circumstances of a particular case and do not require legislative authority or action to be altered.

(2). Whether the opinion of the lower court is correct in reversing the United States District Court's application of the literal meaning of a statute to heirs at law of a testatrix who were sole attesting witnesses to a will where devises to attesting witness were "utterly null and void" and where such attesting witnesses to whom any beneficial estate, interest, gift, or appointment shall be given or made, shall not "demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment so given or made to him" . . . "or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever."

STATUTES INVOLVED

Sections 19-104, 19-105 and 49-301 are set forth in the Appendix 1 hereto at pages 2, 5 and 6 thereof.

STATEMENT

Petitioner is the son of the late Kohar Tomasian, with whom he operated for some years a business within the District of Columbia, respondents are his sisters and who, together with petitioner and other siblings were named beneficiaries of the will of their mother, Kohar Tomasian. (R. 4-6) Said will was drawn by a person not a lawyer, was undated except as to year, 1949, and was witnessed by respondents herein, who were, by its terms, named "executors" therein. Kohar Tomasian died April 12, 1953 and subsequently, upon the petition of respondents, they were qualified as executrices and the will was admitted to probate after testimony was regularly taken of the respondents, sole witnesses thereto.

Four of the testatrix's six children, including petitioner and respondents, made claims against the estate, petitioner's being for money lent deceased in the course of operating the business, expenses of medical care and expenses of last illness chargeable against the estate. Respondents, as executrices, thereupon rejected the major part of petitioner's claim against the estate, demanding that he sue and prove his claims in court, meanwhile, granting their own claims against the said estate, to the diminution of same.

The parties hereto are of Armenian extraction, first generation Americans, and petitioner, the eldest son, had strong patriarchal feelings, common to Near Eastern family culture, which were outraged by his

sisters' action, together with the ordinary chagrin of one who must demonstrate the difference between reality and the proof thereof in open court, of family transactions, sustaining the burden of said proof. Upon consultation with counsel, petitioner was advised of his rights as to the foregoing, as well as to certain questions of devastavit, ademption and advancements made to respondents by the testatrix during her lifetime, subsequent to the drawing and execution of the will. He was advised by counsel that any legacies or devises to the respondents were utterly null and void under the law and that he could achieve the same result of benefit to the estate in filing suit to void the legacies and devises to respondents as he could in pressing claim, on behalf of the estate, on the ademption and advancements, (which would more than have equaled respondents' shares under the will) in addition to prosecuting his own individual action for allowance of money claim against the estate. For these reasons and upon such advice, petitioner simply filed a complaint for construction of the effect of Title 19, Sections 104 and 105, District of Columbia Code, on the will and for instructions to executrices. (R. 2)

The United States District Court for the District of Columbia held in favor of this petitioner, barring respondents from taking any share in the estate, holding any devise, legacy estate, interest, gift or appointment, so far as concerned them null and void and directing that the four remaining devisees and legatees take the whole of the estate. (R. 25, 26)

Upon an appeal by respondents to the United States Court of Appeals for the District of Columbia Circuit, counsel for petitioner was so impressed with the unequivocal language of the statute involved (App. 2),

together with its antiquity and the finding of fact by the District Court that respondents were the sole attesting witnesses to the will (R. 25), that he decided to save the petitioner further expense in printing and preparation of an appellee's brief. During the hearing of the case in the Court of Appeals, one of the judges asked counsel for respondents (there the appellants), whether by certain references in his statement of the case in his brief for appellant, not included in the questions presented to that court, it was meant that the attesting witnesses sought to attack the due execution of the will. Counsel for respondents (appellants) thereupon replied in the affirmative and asked leave to file a supplemental memorandum upon the point. This was granted and he subsequently did so (R. 29-34), counsel for petitioner was allowed to file a reply to the appellants' supplemental memorandum (R. 35-37).

Part of the record before that court was a "statement of facts" filed in the District Court in the defendants' (respondents') answer to the plaintiff's (petitioner's) motion for summary judgment, which statement was signed, as part of a pleading by counsel for respondents, but not attested to by them as an affidavit. (R. 14-19) This, together with argument orally and by way of brief, sought to convince the Court of Appeals that great hardship was suffered by respondents as a result of the judgment of the District Court. As is the rule with this Court, counsel for appellee did not argue the case in the Court of Appeals, not having filed a brief, preferring to rest on the law.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals for the District of Columbia is obviously and patently judicial legislation of the most forthright kind. There can be no doubt but that petitioner, by not filing a brief in said Court and within it a counter-statement of the case, allowed all sympathy which could be shown to be given to respondents; petitioner had to assume that the case would assume such posture when he decided, upon advise of counsel to save himself and the estate the expenses of such brief. And it is further true that one should not expect the court to be blind to sympathetic considerations of any kind.

The Court of Appeals went too far. It assumed a legislative power in violation of the separation of powers doctrine inherent in the Constitution. See *Wayman* v. *Southard,* 10 Wheat. 1, 46; *Prentis* v. *Atlantic Coast Line Co.,* 211 U.S. 210. Moreover, it acts in direct violation of the grant to Congress "To exercise exclusive legislation in all cases whatsoever, over" the District of Columbia. Constitution, clause 17, Sec. 8, Article I.

Three sections of the District of Columbia Code are directly involved; however, as the Court's decision is so broad, it affects, in turn, one hundred eight additional sections of the said Code based upon English statutes in force at the time of the Revolution,[1] of which the statute herein questioned[2] is one of the most recent, having been enacted in 1752, the earliest, having been enacted in the year 1278.[3] By implication, an addition-

---

[1] D.C. Code (1951) p. 1535.

[2] 25 George II, ch. 6, secs. 1 & 7.

[3] 6 Edward I, ch. 5, sec. 1.

al twenty sections constituting Maryland statutes in force[4] and one Virginia statute in force[5] at the time of the creation of the District of Columbia, are affected, a total of one hundred thirty two sections of the District of Columbia Code, constituting the oldest authority extant in the jurisdiction and, especially in the case of wills, real property, frauds, dower, and such, the most closely scrutinized hard and fast rules known to the law.

To know that these old and well tried foundations could be altered, ignored, changed or abrogated as a result of "not only changed conditions but simply the peculiar circumstances of a particular case", (App. 8) would be to sound the death knell of any kind of orderly predictability in the law. This is not a case where Congress has delegated legislative power to the district of Columbia Courts, as in *Keller* v. *Potomac Electric Power Company,* 261 U.S. 428, but if any question of these statutes could be made, as being other than statutes and in some type of judicial limbo of quasi-statutory status, such doubts should certainly be resolved by referring to the District of Columbia Code of 1929[6], 1-1, providing for a codification and consolidation of the laws, general and permanent in their nature, relating to or in force in the District of Columbia, and the preface thereto *p.* v, stating it was the first District Code to include the old British and Maryland statutes of which no complete or accurate compilation was ever made, but which were still in force in the District by virtue of the acts of February 27,

---

[4] *idem,* n. 1.

[5] *op. cit.,* p. 1536.

[6] May 29, 1928, 45 Stat. 1007, c. 910, sec. 2; Mar. 2, 1929, 45 Stat. 1541, c. 586.

1801 and March 3, 1901,[7] and the subsequent (T. 29, ch. 2, secs. 24, 25, 26) and concurrent re-publication of such parts of the statute of 25 George II as apply in the District. It has long been recognized that the statute does apply. *Elliott* v. *Brent,* 17 D.C. (6 Mackey) 98.

Not only the District of Columbia is affected by this matter, but those situations which involve District law outside its geographical boundaries, see *Fisher* v. *Fisher,* 250 N.Y. 313, 165 N.E. 460.

Language has been used by no less an authority than Mr. Chief Justice Marshall who, in *Cathcart* v. *Robinson,* 5 Peters 264, 279, 280, holding the statute of 27 Elizabeth to be in force in the District of Columbia, said that British statutes which are adopted in any of the States become our own as entirely as if they had been enacted by the legislature of the State.

The instant case has caused a good legal apprehension and discussion by the bar, as well as newspaper and editorial attention since it was decided in the Court of Appeals, not only because of its sweeping assumption of a power to change or modify a statute outright, unless that statute is a product of current sovereign power, but also because of its very broad interpretation of the authority of *Holy Trinity Church* v. *United States,* 143 U.S. 457.

The Court reasoned that the result reached by the District Court in holding the devises to heirs at law (children) utterly null and void was absurd (App. 5). Certainly it was no novel result. *Buckley* v. *Gray,* 110 Cal. 339, 42 P. 900, 31 L.R.A. 862; *Browning* v.

[7] 2 Stat. 103, ch. 15, sec. 2, and 31 Stat. 1189, respectively.

Browning, 126 N.J. Eq. 55, 7 A. 2d 816. This case, as does most, has two sides to it and it is important that an individual be able to rely on a long-standing law, unequivocal in its terms, without either giving his reasons for resorting to his rights under it, being made to assume a burden of proof in a different proceeding, being put to additional expense or by having to show that fraud or any other reason set forth in the declaration of policy of a statute exists as a condition precedent to his reliance thereupon. It is especially true, in wills, that a rule of evidence cannot be the subject of enforcement or non-enforcement according to the exigencies of the particular case. The rule must be general in its application and cannot depend upon the opinion of the judges in each case. *Throckmorton* v. *Holt,* 180 U.S. 552.

This case has risen because someone avoided going to competent professionals for advice and help in the preparation of a legal document; other issues would have come up in a different manner had the statute never existed and there is no valid reason to infringe its existence in order to sanctify the unauthorized practice of law. This is particularly true in the light of the rule that every bequest is but a bounty and a bounty must be taken as it is given. *Hunter* v. *Bryant,* 2 Wheaton 32, 37.

Petitioner earnestly contends that great confusion as to the status of the laws of the District of Columbia, wherever they apply, exists in the minds of the laity and bar alike as a result of the decision in this cause by the United States Court of Appeals for the District of Columbia Circuit.

Petitioner also contends that the rule of literal construction of the statutes here involved should be ap-

plied as in *Crooks* v. *Harrelson,* 282 U.S. 55 and *Chung Fook* v. *White,* 264 U.S. 443.

CONCLUSION

For the foregoing reasons it is submitted that the Court should grant this petition for a writ of certiorari, review the proceeding below, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

RUTHERFORD DAY,
International Building
Washington, D. C.

December 19, 1956

APPENDIX

APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12907

SARAH MANOUKIAN AND GLORIA TATIGIAN, Individually and as Executrices of the Estate of Kohar Tomasian, deceased, APPELLANTS,

v.

JOHN M. TOMASIAN, APPELLEE.

Appeal from the United States District Court for the District of Columbia

---

Decided September 20, 1956

Mr. Charles O. Pratt for appellants.

Mr. Rutherford Day entered an appearance for appellee, for whom no brief was filed.

Before EDGERTON, Chief Judge and BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* Plaintiff-appellee is one of the six children of Mrs. Kohar Tomasian, now deceased. Mrs. Tomasian's will, after provision for payment of debts and funeral expenses, devised and bequeathed a sum to a named charity, and the residue of her estate equally to her six children, who are also her sole heirs.[1] The only witnesses to the will were two of

[1] Provision was also made by testator, by a paragraph not relevant here, in case any of her children should fail to survive her.

her daughters, appellants here. They were named executrices by the will and were examined in the probate proceedings. Appellee, after probate had been granted, brought this action to construe the will on the theory that under Sections 19-104 and 19-105 of the D. C. CODE,[2] appellants were barred from taking under the will because they were its sole witnesses and had testified to establish it. The District Court granted summary judgment for appellee, relying on these statutory provisions.

---

[2] "§ 19-104. Devises to attesting witnesses void.

"If any person shall attest the execution of any will or codicil to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil; notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil.

"§ 19-105. Attesting devisee not to retain nor demand any property under will or codicil.

"No person to whom any beneficial estate, interest, gift, or appointment shall be given or made, which is null and void under section 19-104, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment so given or made to him in or by any such will or codicil; or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever."

In view of our disposition of the present case, we need not here consider whether the procedure adopted by the appellee was the proper one by which to raise questions as to the applicability or effect of the quoted sections. *Cf.* Fortune v. Buck, 25 Conn. 1, *8 (1854); Clark v. Clark's Estate, 54 Vt. 489 (1882).

Appellants urge that this result is most unjust, and defeats the intention of the testatrix to treat all her children equally. They note that no fraud or undue influence is alleged or even suggested, and urge that they witnessed the will in good faith, at testatrix' request. Appellee, they say, is relying on a technicality in order to disinherit two of his sisters and increase his own share in the estate.

Sections 19-104 and 19-105 of the D. C. CODE are derived from the statute of 25 GEO. II, Ch. 6 §§ 1, 7, adopted by Parliament in 1752. Prior to that time, in order to destroy any incentive to a witness to perjure himself to establish a fraudulent will making a devise to him, the courts had refused to permit a witness who was a devisee under a will to testify to establish that will. The effect of this attitude of the courts was to prevent establishment of the will in its entirety. In order to preserve as much of the will as possible, while continuing to discourage efforts to establish fraudulent wills, Parliament passed the statute of 1752, which permitted the devisee-witness to testify, and which voided only the devise to him.

In most jurisdictions within the United States, there are legislative enactments specifically dealing with this problem in a manner essentially like the statute of 1752. See Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 1, 20, 22 (1928). In the vast majority of such jurisdictions, however, the legislature has concluded that it could soften the rigors of the old statute, without in any way undermining its efficaciousness, by permitting one who would take a share of the estate were it to pass by intestacy to take the devise in an amount no greater than his intestate share. See Bordwell, *supra*, at 24-25.[3]

---

[3] See also Model Execution of Wills Act § 3, 9 U. L. A. 421. Some states appear to go further and permit any witness to take his devise up to the share he would have taken were the will not established (e.g., a non-heir mentioned in a prior will). See e.g., KY.REV.STAT. § 394.210(2) (1953).

We think that in cases like the present one such a rule is sound.

The manifest object of the English statute of 1752 was to give maximum effect to wills witnessed by legatees and at the same time eliminate the opportunity for witness-legatees to benefit from fraudulent attestation. But in the instant case the witness-legatees would—because of the bequest to charity—receive a greater share of the estate by intestacy than under the will. Consequently were Section 19-104 to be literally applied, witness-legatees situated like these appellants would have an opportunity to benefit from fraudulent efforts—such as false denial of proper attestation—to defeat the probate of a will. Thus the "very evils to be remedied," *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 350-51 (1937), would be resurrected. We cannot ascribe such an intent to the framers of the statute. The basic purpose of the statute—to uphold wills while eliminating possibilities of fraud—is in our view best carried out by holding that the witness-legatee who is also an heir at law can testify as to the execution of the will, and can take his devise under the will, but in an amount no greater than his intestate share. *Cf. In re Trotter* [1899], 1 Ch. 764; *Gurney* v. *Gurney*, 3 Drew 208, 61 Eng. Rep. 882 (1855).

We think such a holding is proper here, under established principles. "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, *or of the absurd results which follow from giving such broad meaning to the words,* makes it un-

reasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church* v. *United States* 143 U.S. 457, 459 (1892). (Emphasis supplied.) Thus has the Supreme Court applied the "equity of the statute" doctrine[4] to exempt under appropriate circumstances a specific case from broad statutory language.

Furthermore, we must point out that Sections 19-104 and 19-105, unlike most portions of the District of Columbia Code, are not themselves acts of Congress passed for the government of the District Instead, they are part of the law of the District because they are British statutes which were recognized as being in force in Maryland prior to the cession of the District in 1801, and which were maintained in effect by the Act of March 3, 1901, 31 STAT. 1189 D. C. CODE § 49-301 (1951). The Code section just cited reads as follows:

> "§ 49-301. Common law, principles of equity and admiralty, and Acts of Congress to remain in force.
> "The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress."

---

[4] The development of the doctrine from Aristotle, through Plowden, and into modern jurisprudence is well documented by Judge Frank in Usatorre v. The Victoria, 172 F. 2d 434, 439-43 & nn. 12-16 (2d Cir. 1949). "Where the purposes of the statute can be achieved only by extending the operation of the language of the statute it will be extended, and where the purposes of the statute will be defeated by a literal interpretation of the statute the language will be restricted." 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6004 (3d ed. 1943).

The congressional reference to old British laws in the section just quoted gives to those laws only "that force which they previously had in this tract of territory under the laws of Maryland." See *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 234, 242 (1819). What was the force which the statute of 1752 "previously had"? It was received here during the colonial period not because of a voluntary reception by American courts—as was usually the case—but because the Act of Parliament in question by its terms applied to the colonies. Thus it seems clear that during the colonial period, the statute had the effect of a legislative enactment. From this it might be argued that this statute, in contrast to those voluntarily received here, should continue to have the force of legislative enactment. But after the Declaration of Independence British statutes were no longer the commands of an effective sovereign power in Maryland. Maryland decreed in 1776, in its original Declaration of Rights:

> "That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity . . . " See D. C. Code (1951, Vol. 1, p. xx.

The Declaration of Rights drew no distinction between British statutes which were expressly made applicable to the colonies by Parliament, and those which were not. The statute of George II thus must be given the same force as—and no more than—any other British statute received here by July 4, 1776.[5] That it was so received

---

[5] That the coming of the Revolution represents a denial of mandatory effect even to those British statutes by their terms appli-

here by that date is, of course, not to be questioned. *Elliot* v. *Brent,* 17 D. C. (6 Mackey) 98, 102 (1887).

British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent, rather than legislative enactment. "The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, becomes in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province." *Bogardus* v. *Trinity Church,* 4 Paige 178, 198 (N. Y. Ch. 1833), aff'd 15 Wend. 111 (N. Y. Ct. of Errs. 1835).[6] Such statutes are for many purposes considered part of our common law, *Patterson* v. *Winn,* 30 U.S. (5 Pet.) 232 241-42 (1831); *cf. Gertman* v. *Burdick,* 75 U.S. App. D.C. 48, 53, 123 F.2d 924, 929 (1941), cert. denied sub nom. *Burdick* v. *Burdick,* 315 U.S. 824 (1942), to be applied by American courts like the common law, rather than like enactments of our own legislatures. In substance, they have been received here as "part of our judicial heritage," *cf. Gertman* v. *Burdick, supra,* and should be interpreted and applied as such.

---

cable to the colonies receives considerable support in Sioussat, *The English Statutes in Maryland* 66-68 (1903), at 21 JOHNS HOPKINS UNIV. STUDIES IN HISTORICAL AND POLITICAL SCIENCE (Nos. 11-12) 465, 530-32.

[6] See also Sattig v. Small, 1 Kan. 165, 170 (1862); Cresson's Appeal, 30 Pa. 437, 450 (1858); In re Kimberly's Estate, 249 Pa. 483, 487-488, 95 Atl. 86, 87-88 (1915); Gray, *The Nature and Sources of the Law,* 197; *cf.* People v. DenUyl, 320 Mich. 477, 486, 31 N. W. 2d 699, 703 (1948); Haggin v. International Trust Co., 69 Colo. 135, 138, 169 Pac. 138, 139 (1917); Sioussat, *supra* n. 4, at 42, 21 JOHNS HOPKINS UNIV. STUDIES at 506.

The Supreme Court has clearly laid down the principles that govern our interpretation of the common law: "It has been said so often as to have become axiomatic that the common law as not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U.S. 371, 383 (1933). The Supreme Court also cited with approval, *id.* at 383-84, the statement of the Indiana Supreme Court, 184 Ind. 702, 707, 111 N.E. 423, 425 (1916), that:

> " 'One of its [the common law's] oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself.' "

And not only changed conditions but simply the peculiar circumstances of a particular case may justify departure from a rule of the common law to reach a sensible result. See *Lutwak* v. *United States*, 344 U.S. 604, 615 (1944). As the New York Court of Appeals has declared, "We act in the finest common law tradition when we adapt and alter decisional law to produce common-sense justice." *Woods* v. *Lancet*, 303 N. Y. 349, 355, 102 N. E. 2d 691, 694 (1951). See also Vanderbilt, C. J., dissenting in *Reimann* v. *Monmouth Consolidated Water Co.*, 9 N. J. 134, 149-150, 87 A.2d 325, 332-34 (1952).[7]

---

[7] See also Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 8 (1936): "Blackstone, and as conservative a judge as Mr. Justice Parke, admitted that the judge in the common-law system may rightly refuse to follow a precedent which is absurd, contrary to reason, or plainly inconvenient."

Thus, whether we approach this case as one requiring construction of a statute or as one calling for application of common law principles, we think the result should be the same—a result based on reason and justice. We recognize that the old British statutes that have been received in the District of Columbia must be considered well established rules of law, not to be varied without good reason. Nor do we lightly undertake the task of excepting a particular case from the general rule of a statute—old or new. But here we think the course to be taken is plain: to exclude this case from the literal wording of Sections 19-104 and 19-105.

For these reasons, the judgment of the District Court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

APPENDIX 2

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,907

April Term, 1956

C. A. 3452-54

Filed September 20, 1956

SARAH MANOUKIAN and GLORIA TATIGIAN, Individually and as Executrices of the Estate of Kohar Tomasian, deceased, *Appellants,*

v.

JOHN M. TOMASIAN, *Appellee.*

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON, Chief Judge and BAZELON and WASHINGTON, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ORDERED by the Court that the costs of all the parties on this appeal be borne by the Estate of Kohar Tomasian, deceased.

Dated: September 20, 1956.

Per Circuit Judge Washington.

53/14

FILED
FEB 20 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 640

JOHN M. TOMASIAN, *Petitioner*

v.

SARAH MANOUKIAN AND GLORIA TATIGIAN, Individually and as Executrices of the Estate of Kohar Tomasian, Deceased, *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES ORLANDO PRATT
Continental Building
1012 - 14th St., N. W.
Washington 5, D. C.
Attorney for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 640

JOHN M. TOMASIAN, *Petitioner*

v.

SARAH MANOUKIAN AND GLORIA TATIGIAN, Individually and as Executrices of the Estate of Kohar Tomasian, Deceased, *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the unanimous opinion of the lower court is correct, based on reason and justice, in excluding this case from the literal wording of Sections 19-104 and 19-105 of the District of Columbia Code, 1951 Edition, and thereby holding that the respondents, witnesses—legatees, who are also heirs-at-law can testify as to the execution of the will, and can take their devise under the will, but in an amount no greater

than their intestate share and when no fraud or undue influence is alleged or even suggested.

STATEMENT

The respondents hereby adopt the concise statement of the case containing all that is material to the consideration of the questions presented as set forth in the opinion of the United States Court of Appeals, reported in 237 F. 2d 211. It is not deemed necessary here to answer or correct the statement contained in the petition herein which relates alleged facts not contained in the trial or Appellate court record or in said opinion, for the reason that such statement contains alleged facts not material to consideration of the questions presented.

ARGUMENT

The respondents respectfully submit that the opinion, based on reason and justice, and the judgment entered in this case on September 20, 1956, in the United States Court of Appeals For the District of Columbia Circuit, reported in 237 F. 2d 211, is just and correct for the reasons set forth in the unanimous opinion, including the Chief Judge of that Court, and therefore it is respectfully submitted that, based upon the reasoning, the laws and the authorities cited in said opinion, the petition for a writ of certiorari should be denied.

Your respondents respectfully submit that the petition for writ of certiorari should be denied for the further reasons that there are no special and important reasons therefor; the decision of the lower court is plainly right and it is not in conflict with a Supreme Court or lower court decision or decisions, or even with

the principle or language of such decision; the lower court's decision is not a departure from the accepted and usual course of judicial proceedings; its decision did not decide a federal or constitutional question and it did not hold unconstitutional the statutes involved or invalidate them in any manner or form. The decision of the lower court merely excluded the instant case from the literal wording of Sections 19-104 and 19-105 of the D. C. Code. The Court reached, "a result based on reason and justice." Therefore, it did not affect by implication or otherwise, any section of the D. C. Code or any state or federal statute.

The decision is of consequence primarily to the particular parties herein and does not present questions whose resolutions will have importance beyond the particular facts and parties involved or beyond the jurisdiction of the District of Columbia, and it is traditional that the Supreme Court will accept its ruling as final on such local matters when the result is permissible, plainly right and just.

The Court of Appeals has concluded that it could soften the rigors of the old statute, without in any way undermining its efficaciousness, by permitting one who would take a share of the estate were it to pass by intestacy to take the devise in an amount no greater than his intestate share. The Court clearly and unequivocally stated in its opinion that, "This is not the substitution of the will of the judge for that of the legislator," and added for emphasis, "And not only changed conditions but simply the peculiar circumstances of a particular case may justify departure from a rule of the common law to reach a sensible result."

The lower court decision clearly establishes the intent involved and does not leave the intent or meaning in

confusion; the issue herein concerning local law does not have national repercussions and the decision does not constitute a precedent of national application. This case does not involve the application of a national statute to the District as distinguished from a statute applicable only to the District of Columbia. The Supreme Court has stated that it "will not ordinarily review decisions of the United States Court of Appeals based upon statutes so limited [confined in operation to the District] or which declare the common law of the District."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES ORLANDO PRATT
Continental Building
1012 - 14th St., N. W.
Washington 5, D. C.
Attorney for Respondents

February 20, 1957